MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE,
Appellant

v.

FRANCES B. DAVIS,
Appellee

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA

JEFFREY H. ORLEANS
Special Assistant to the President

ELIZABETH C. BUNTING
Counsel

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SOUTHEASTERN COMMUNITY COLLEGE,
Petitioner,

v.

FRANCES B. DAVIS,
Respondent.

MOTION FOR LEAVE TO FILE AS AMICUS

The Board of Governors of the University of North Carolina respectfully requests permission to file as *amicus* in the above captioned case. Our interest in submitting this brief rests on the fact that Section 504 of the Rehabilitation Act of 1973, 29 USC 794, *particularly* as construed by the Court below, will have a substantial impact on the programs and policies of the sixteen constituent institutions which make up the University of North Carolina. Because we believe that the construction of this statute by the Department of Health, Education and Welfare and the Courts is not in keeping with the spirit, intent or even the plain language of the Act itself, we are deeply interested in an in-depth analysis of this statute by this Court. For these reasons, we would appreciate this opportunity to address those views we feel necessary for this analysis.

We file this motion and accompanying brief technically on behalf of respondent; however, as noted above, we do not

support either of the Courts below in this case. Instead, we would offer this different approach to the questions concerning handicap discrimination in the academic environment.

This the 23rd day of March, 1979.

Respectfully submitted,

JEFFREY H. ORLEANS
Special Assistant to the President
The University of North Carolina
Post Office Box 2688
Chapel Hill, North Carolina 27415

ELIZABETH C. BUNTING
Counsel

Counsel for the
BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA

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Appellee

BRIEF *AMICUS CURIAE*
OF THE BOARD OF GOVERNORS
OF THE UNIVERSITY OF NORTH CAROLINA

I. INTEREST OF AMICUS CURIAE

The University of North Carolina is a public university composed of the sixteen State-supported senior institutions of higher education in North Carolina and enrolling over one hundred thousand students. The Board of Governors is the "body politic and corporate" embodying The University, and is "responsible for the general determination, control, supervision, management and governance of all affairs of the constituent institutions." N.C.G.S. 116-3, 116-11(2).

As recipients of federal financial assistance, The University's constituent institutions are subject to various federal civil rights statutes administered by the Department of Health, Education, and Welfare (hereinafter, "H.E.W."), and thus The University's resources and operations are affected significantly by the standards, procedures, and legal requirements developed by that Department and by the courts in interpreting and applying such legislation. One such provision that applies to The University and affords University students protection against discrimination is Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; H.E.W. has issued a regulation to implement Section 504 that applies to this University, 45 C.F.R. Part 84. *Amicus* believes that key provisions of this regulation are not in keeping with the spirit or purpose of Section 504, and that their application to The University therefore will have a direct and improper adverse impact on the students attending the public senior institutions of North Carolina. Additionally, should this Court remand the present litigation, any decision by the Court of Appeals for the Fourth Circuit would state the law of the Circuit in which this University is located. The Board's interest in the present litigation, therefore, is substantial.

Amicus does not support the opinion of either of the courts below in this case. The opinion of the district court was rendered prior to issuance of the H.E.W. regulation which is significantly at issue before this Court. The decision of the Fourth Circuit which endorsed application of that regulation is faulty both factually and legally. Both the opinions below and the H.E.W. regulation fail to provide handicapped students with appropriate opportunities for accommodation to their handicaps, and fail to provide institutions of higher education with appropriate opportunities for determining what accommodation should be made to handicaps.

II. HISTORY OF THE CASE

Section 504 of the Rehabilitation Act of 1963, 29 U.S.C. 794, provides that:

> no otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.

On June 3, 1977, the Department of Health, Education, and Welfare issued at 45 C.F.R. Part 84 a regulation that defines the responsibilities of educational institutions subject to Section 504, and that applies both to admission decisions and to subsequent treatment of students during matriculation.

Reliance on H.E.W.'s regulation forms the core of the court of appeals opinion in this case. That regulation, however, does not properly resolve the rights of either party to this case, because it seeks to apply Section 504 in ways that depart from settled and sound principles controlling implementation of federal civil rights legislation. In this litigation, therefore, this Court has the opportunity to direct a return to historically tested means of eliminating discrimination that will apply Section 504 far more effectively and correctly than will the H.E.W. regulation.

Ms. Davis' application for enrollment in Southeastern's registered nursing curriculum was rejected after Southeastern's Admissions Review Committee "determined by reason of her severe hearing impairment that she is not a qualified applicant for training as a Registered Nurse." *Davis* v. *Southeastern Community College,* 424 F. Supp. 1341 at 1342 (E.D.N.C. 1976). She brought suit alleging a violation of Section 504, and the district court held that she was not "otherwise qualified" for the nursing curriculum, and thus was not entitled to relief. The court found that:

> the single major factor in the defendant's refusal to allow admissions [sic] to plaintiff was her projected inability to be licensed as a Registered Nurse after

graduation. 424 F. Supp. 1341 at 1344.[1]

Plaintiff's application and rejection and the district court's consideration of her claim all occurred prior to issuance of the H.E.W. 504 regulation.

Plaintiff appealed to the Court of Appeals for the Fourth Circuit, which based its decision on the H.E.W. regulation that was issued six months following the district court opinion. While the Fourth Circuit panel "expressed[ed] no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree," *Davis* v. *Southeastern Community College,* 574 F. 2d 1158 at 1160 (n. 5) (4th Cir. 1978), it held that:

> the district court erred by considering the nature of the plaintiff's handicap in order to determine whether or not she was "otherwise qualified" for admittance to the nursing program [citation omitted], rather than by focusing upon her academic and technical qualifications as required by 574 F. 2d at 1161.

The cited regulations provide, at 45 C.F.R. 84.3(k)(3), that:

> With respect to post-secondary and vocational education services [an otherwise qualified handicapped person is one] . . . who meets the academic and technical

[1] The record does not disclose whether plaintiffs' impairment in fact would have disqualified her for licensure under applicable North Carolina law. As did the court of appeals, *Amicus* "express[es] no opinion concerning the scholastic suitability of the plaintiff to pursue her studies toward an RN degree," 574 F. 2d at 1160 (n. 5), or "the question of 'limited' versus 'unlimited' certification of the plaintiff as an RN," *id.* at 1161 (n. 6).

> standards requisite to admission or participation in the recipient's education program or activity.

Holding that "precedent likewise supports the requirement of affirmative conduct on the part of certain entities under Section 504, even when such modifications become expensive," 574 F. 2d at 1162, the court of appeals instructed the district court on remand "to give close attending," *ibid.*, to two particular Sections of the H.E.W. regulations in affording plaintiff relief:

> *45 C.F.R. 84.44(a). Academic requirements.*
> A recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. *** Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.
>
> *45 C.F.R. 84.44(d)(1). Auxiliary aids.*
> A recipient . . . shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

The defendant's petition for *certiorari* posed two related questions that impliedly attacked the above-quoted portions of the regulation as going beyond the intent of the statute:

> (1) Does Section 504 of Rehabilitation Act preclude public college from basing denial of admission to college's Associate Degree Nursing Program solely upon admittedly severe hearing handicap of applicant,

where it is shown that handicap could interfere with applicant's ability to provide safe patient care both as student nurse and as potential Registered Nurse?

(2) Does Section 504 impliedly impose upon colleges affirmative obligation to provide preferential but modified educational opportunities for seriously handicapped who seek admission to highly skilled professional programs? 47 LW 3451 (January 8, 1979).

III. QUESTION PRESENTED

Does the construction of Section 504 by the Court of Appeals and the Department of Health, Education, and Welfare conflict with the true purpose of the Statute?

IV. SUMMARY OF ARGUMENT

Amicus believes the parts of the H.E.W. regulation on which the court of appeals relied embody two basic inadequacies that, if actually enforced, are more likely to harm handicapped students than to meaningfully assist them, and are likely to unnecessarily restrict institutions of higher education in their capacities to give genuinely practical and effective support to handicapped students. First, the regulation presumes that handicapping conditions are irrelevant to a potential student's admissibility to or success in an education program, and that students can—indeed, must—be considered for admission to education programs without regard to their capacities for success at any time other than at the initial stage of admission.[2] Both these presumptions are wrong as matters of fact. Second, the cited sections of the regulation in effect purport to impose on institutions absolute responsibility for offsetting the effects of handicaps after students are admitted. That ostensible

---

[2] While 45 C.F.R. 84.3(k)(3) refers to meeting standards of "admission or *participation*", *supra* [emphasis added], it is clear from the context of the regulation that "participation" refers only to initial entry into a program and is used synonymously with "admission."

obligation is uncalled for as a matter of law. Further, the suggestion of such an obligation may well mislead handicapped students into believing that admission to an education program is tantamount to subsequent success within that program or in the occupation for which it prepares students. That result is rarely true for *any* student, and H.E.W. in fact declines to guarantee it for *handicapped* students in a section of the regulation not discussed by the court of appeals panel.

Thus the apparent protections afforded students by the opinion below are illusory, and the constraints imposed upon institutional judgment in accommodating handicapped students are unjustified. Both these fundamental errors may be rectified by simple changes in the regulation based on clear precedent derived from other areas of equal opportunity law.

V. THE STATUTORY CONTEXT

While the Fourth Circuit panel purported to "limit our holding and our interpretation of the above-quoted regulations to the facts of this particular case . . . [and not] to expand further upon the regulations, their reasonableness, or their scope," 574 F. 2d at 1161 (n. 7a), the panel did, in effect, approve the cited Sections of the H.E.W. 504 regulation as written. Thus this Court is asked to decide whether the absolutist provisions of the cited Sections of the regulation validly interpret and apply Section 504, both facially and in a wide variety of specific situations in institutions of higher education, or whether alternative standards are needed to properly implement the statute.

Section 504 was modeled formalistically after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Title IX of the Education Amendments of 1972, 29 U.S.C. 1681 *et seq.*, and shares their purpose of preventing discrimination in, exclusion from, or denial of benefits under programs receiving federal financial assistance. Prohibiting discrimination based on handi-

cap, however, potentially raises issues quite different from those involved in prohibiting discrimination based on race or sex. The H.E.W. regulation fails to acknowledge those differences, while at the same time neglecting appropriate methods for attacking handicap discrimination against students that are consonant with the proven sound administration of analogous civil rights statutes.

Race and sex are both inherently suspect statutory classifications, deemed in law both by Congress and by this Court to be irrelevant to qualification for educational and employment opportunities. The scrutiny that should be given practices based on factors that *are* potentially material to such qualification, however, is unclear; review involving at least one such factor—age—is clearly to be less rigorous than where race or sex is at issue.[3] That there has been little address of what consideration properly may and should be given physical or mental handicap emphasizes the need for caution in seeking to employ Section 504; it has no useful legislative history, and less than a dozen reported judicial opinions purport to construe it within the context of higher education.[4]

In this context, the application of Section 504 should begin by recognizing the fundamental underlying difference between pur-

[3] Compare *Griggs* v. *Duke Power Co.*, 401 U.S. 421 at 436 (1971) and *City of Los Angeles Dept. of Water and Power* v. *Manhart*, U.S. at , 57 LED 2d 657 98 S. Ct. 1370 (1978), emphasizing the limited analytical role remaining when "Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful" under Title VII of the Civil Rights Act of 1964, 98 S. Ct. at 376, with this Court's refusal to extend to age discrimination "suspect classification" status under the Equal Protection Clause in *Commonwealth of Massachusetts Board of Retirement* v. *Murgia*, 421 U.S. 974 (1976), and *Vance* v. *Bradley*, U.S. , 47 LW 4176 (1979).

[4] See, e.g., *Counts* v. *U.S. Postal Service*, holding that "[t]he appropriate standard of judicial review" under the Equal Protection Clause, of a Postal Service regulation barring persons with histories of epilepsy from certain kinds of jobs, "is not, as plaintiff contends, the 'strict scrutiny' test ordinarily applied where suspect classifications are involved." F. Supp. , 18 EPD Par. 8788 at p. 5253 (N.D. Fla. 1978).

porting to measure an individual's capacities based on his or her race or sex and purporting to do so in light of a demonstrably handicapping condition. The former attributes, virtually without exception, are irrelevant to one's abilities, in fact and therefore in law; that is why this Court validly could say about the job discrimination ban of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, that when "Congress . . . made [job] qualifications the controlling factor [in employment decisions] . . . , race, religion, nationality, and sex become irrelevant." *Griggs* v. *Duke Power Co.*, 401 U.S. 424 at 436 (1971). Both physical and mental handicaps may be inherently material to evaluating qualifications and capacities, however, so that "measur[ing] the person for the job and not the person in the abstract," *ibid.*, makes dispassionate address of the effects of handicap *essential* rather than extraneous.

Section 504 is predicated on this view, for it uses the Rehabilitation Act's statutory definition of a "handicapped person" as one who, *inter alia*,

> (i) has a physical or mental impairment which *substantially limits one or more major life activities.* 29 U.S.C. 706(b)(B); see also 45 C.F.R. 84.44(3)(h). [Emphasis added.]

It is thus apparent that, *by statutory mandate*, effective implementation of Section 504 requires acknowledgement that handicaps in fact may "substantially limit" personal abilities; the H.E.W. regulation precludes precisely that recognition. And cogent standards for measured and sensitive response to handicaps are particularly important in higher education, for this Court repeatedly has emphasized the need to assure that governmental scrutiny of colleges and universities is consistent with institutional diversity and autonomy.[5]

[5] See, e.g., *Board of Regents* v. *Roth*, 408 U.S. 564 and *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Board of Curators of the University of Missouri* v. *Horowitz.*, U.S. , 55 LED 2d 124 98 S. Ct. 948 (1978); and *Bakke* v. *Board of Regents of the University of California*, U.S. , 57 LED 2d 750 98 S. Ct. 2733 (1978) (opinion of Powell, J.).

As *Amicus* seeks to demonstrate below, however, the H.E.W. regulation endorsed by the court of appeals effectively denies the materiality of handicapping conditions throughout the educational experience. The sections of the regulation cited by the court of appeals refuse to recognize that handicaps *do* "substantially limit . . . major life activities," and that the Rehabilitation Act requires that those limits be remedied if possible, not ignored. The regulation thus departs from the statute in the fundamental sense that it requires institutions to *overlook* the possible effects of handicaps on students, while the statute requires institutions to *consider* those effects but to do so *nondiscriminatorily.* The regulation's central flaw is that it precludes just such an approach.

Judicial deference to regulations of federal agencies enforcing civil rights legislation should be informed by an appreciation of those regulations' actual inadequacies as well as of their intended beneficial impact; this Court has declined to follow federal civil rights guidelines where there is "persuasive indication" that they "sharply conflict with other indicia of the proper interpretation" of civil rights legislation. *General Electric Co.* v. *Gilbert,* 429 U.S. 125 at 143 (1976).[6] *Amicus* submits that, after careful analysis, this Court should decline to endorse the H.E.W. regulation as construed by the court of appeals because it does not properly protect appellee or otherwise properly interpret Section 504.

VI. ARGUMENT

Because the district court's ruling preceded issuance of the H.E.W. regulation, that court did not have the regulation available

[6] Compare *Lau* v. *Nichols,* 414 U.S. 563 (1974), sustaining application of an H.E.W. regulation under Title VI, with cases refusing to enforce sections of the H.E.W. regulation under Title IX: *Romeo Community Schools* v. *H.E.W.,* 438 F. Supp. 1021 (E.D. Mich. 1977), appeal docketed No. 6-71438 (6th Cir. May 18, 1977); *Seattle Univ.* v. *H.E.W.,* F. Supp. , 16 EPD Par. 8241 (W.D. Wash. 1978); *Brunswick School Bd.* v. *Califano,* 449 F. Supp. 866 (D. Me. 1978).

for its consideration. The subsequent opinion of the Fourth Circuit panel, however, does not so much address the holding below as endorse that regulation. Unless the regulation has a different meaning than is apparent, *Amicus* believes it mandates erroneous regulatory standards for defining the rights of handicapped applicants and students and for guiding and measuring institutional responses to their needs.

The regulation properly seeks to assure that the presence of a limiting handicap, in and of itself, does not automatically result in a denial of admission. As *Amicus* seeks to show, however, it adopts a view of the opposite extreme that overbroadly and mistakenly applies the statute. That is, the regulation concludes in effect that institutions of higher education must disregard the presence of any "substantial limits" to educational or professional capacity or achievement, caused by handicaps, in determining, first, whether applicants are qualified for admission to education programs and, thereafter, the extent of accommodation to handicaps that institutions should provide.

Because this approach is inconsistent with the realities both of the educational process and of authentic accommodation to handicaps within that process, it offers handicapped students a promise of success that may well not be susceptible of fulfillment. Indeed, a section of the regulation not discussed by the court of appeals significantly impinges on that promise. At the same time, the regulation places constraints on the exercise of educational judgment that have no relevance to the elimination of actual discrimination.

A. The regulation improperly precludes consideration of the effects of handicaps upon qualification for admission to education programs.

The sections of the H.E.W. regulation approved by the Fourth Circuit panel begin with the serious error of refusing to

acknowledge that a "handicap" potentially limits a student's ability to meet expectations about individual competence and performance that are valid parts of the educational process. That failure will not help a handicapped student meet the performance expectations he or she will encounter, or guide an institution in helping him or her to do so; students deserve realistic consideration of possible limits to their achievements as much as they do positive assistance in achieving as much as they potentially can.

Section 504's statutory basis for mandating a special response to handicaps is that they *do* constitute actual or potential "substantial limits" of a "major life activity," 29 U.S.C. 706(6)(B); 45 C.F.R. 84.3(j)(1). In this language the Rehabilitation Act *definitionally* acknowledges the potential relevance of a handicap to successful accomplishment in education, or any other field. At least as interpreted by the Fourth Circuit panel, however, the H.E.W. regulation conflicts directly with this premise, by decreeing that the presence of a handicap is irrelevant to *any* consideration of whether the "academic and technical standards" of admission are met, 574 F. 2d at 1161, *supra.*

Discrimination based on handicap often embodies inaccurate perceptions of the extent to which handicaps may impede successful use of educational opportunities, or of the effectiveness and expense of various efforts to overcome such impediments. Pretending that "limits" to "major life activities" do not exist, as do the regulation and the court of appeals, will not truly help those who are subject to those limits.

B. The regulation improperly separates consideration of initial admission to education programs from consideration of successful achievement during matriculation.

The regulation's error of misperceiving the potential effects of handicaps upon students is compounded by fundamentally misperceiving the nature and purpose of the student's educational

experience generally. Put simply, the model of education implicitly adopted by the regulation disregards the commonplace and basic expectations that students will develop and increase their capacities during matriculation, will successfully achieve a variety of educational objectives, and will successfully complete an education program. The regulation presumes instead that the educational experience consists of passively absorbing the content of some predetermined, static, and unvarying "program or activity"—with no expectation as to the student's participation save that he or she be initially "qualified" at the entry point. That is the clear result of the regulation's equating of "qualification" for participation *throughout* an education program, with meeting the standards for *"admission"* to it. 45 C.F.R. 84.3(k)(3), *supra.*

But in higher education, admissions decisions and standards are not seaparate from the rest of the educational process; they merely inaugurate it. They are useful only to the extent they anticipate, inform, or predict the student's success within that experience. The benefits potentially available to *any* student after admission largely reflect his or her own changing capacities to use the resources and opportunities a particular school or college presents. Pretending otherwise, as the regulation does by refusing to consider a student's likely experience after admission, provides apparent access to opportunities that the student foreseeably may not be able to use effectively. That is the hollowest kind of "nondiscrimination."

Indeed, a section of the regulation not cited by the court of appeals largely negates the admissions standard ostensibly embodied in Section 84.3(k)(3). At 45 C.F.R. 84.43(a), the regulation states that *after* admission:

> *Academic requirements that the [institution] can demonstrate are essential* to the program of institution being pursued . . . or to any directly related licensing requirement *will not be regarded as discriminatory.* [Emphasis added.]

This caveat presents the anomaly of an institution accepting an applicant—being *required* to accept an applicant—whom it knows cannot complete all essential elements of its program, and then being permitted to require of that student precisely those academic attainments it is known the student cannot accomplish.

The regulation thus substantially takes away the opportunity it purports to have conferred. That result, largely vitiating the protections apparently offered as to "admissions" alone, derives directly from the regulation's seeking to separate "admission" from all that follows it within the higher education experience.[7]

Higher education is not a *thing* but a *process;* the opportunities it offers are not simply the acquisition of "admission," but access to active participation in a myriad of subsequent activities, programs, people, and competencies. The student does not acquire these benefits simply by demonstrating initial eligibility at some single point in time, but by subsequently pursuing the opportunities thereby opened. The regulation offers no true protection to handicapped students by pretending otherwise.

Being a student is not, for example, equivalent to being a nonambulatory subway passenger, absolutely entitled to substantial accommodations to one's mobility impairments. See *Washington Urban League, Inc.* v. *Washington Metropolitan Area Transportation Authority, Inc.,* Civil Action no. 776-33 (D.D.C., September 1, 1976; unpublished memorandum and order). Students pursue federally financed educational experiences under expectations of active growth and accomplishment—of intelligence, dedication, and preparation upon enrollment, but then of continued achievement throughout matriculation. Though

[7] Instead, of course, institutions could choose to require as initial admissions criteria stricter standards, explicitly encompassing potential success at the end of a variety of particular courses of study. That result would simple increase barriers to admission for *all* students, rather than lowering them for handicapped persons.

of a subway passenger nothing more may be asked than the relatively passive virtue of civility, education is not a subway ride; the student is not a passenger.

C. The regulation fails to provide a clear and appropriate standard for accommodating the potential effects of handicaps upon educational achievement after admission.

This Court recently has emphasized the importance both of students' performance and of institutional autonomy in assessing that performance:

> University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation. *Board of Curators of the University of Missouri* v. *Horowitz.,* U.S. , 98 S. Ct. 948 (n. 6). (Powell, J., concurring).

These premises are not less apposite or susceptible of careful application when alleged discrimination is at issue than in the due process context before this Court in *Horowitz.* Yet the cumulative effect of H.E.W.'s regulatory perspective is virtually to preclude consideration either of a handicap's potential adverse effects on educational performance or achievement, or of the extent of realistic opportunities for overcoming such effects.

The regulation accomplishes this unwise result by adding to the requirement that admissions decisions be made "without regard to . . . disability," 475 F. 2d at 1160, the requirements for "academic adjustments" and "auxiliary aids" commended by the court of appeals and quoted above—that *after admission,* institutions *"shall," inter alia,* "make such modifications to [their] academic requirements as are necessary . . ." and "take such steps as are necessary to ensure" a lack of discrimination attributable to

"the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." 44 C.F.R. 84.44(a),(d)(1), *supra.* In combination, these broad strictures suggest that institutions *must*—and, therefore *can*—ameliorate any constraints caused by a handicap throughout the educational experience.

The error in this approach is both simple and pervasive: It may not always be possible for the effects of handicaps to be accommodated to acceptable levels of educational performance, and it is the individual student who ultimately must cope with that result. That is the clear message of the regulation's "essential academic requirement" caveat that the court of appeals failed to consider, and it is echoed in the "Analysis" H.E.W. published to accompany the regulation, in addressing persons handicapped by reason of alcoholism or drug addition:

> It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. *The fact that drug addiction and alcoholism may be handicaps does not mean that those conditions must be ignored in determining whether an individual is qualified* for services or employment opportunities. *On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others* . . . . 42 *F.R.* 22682 (May 4, 1977). [Emphasis added.]

As written, the sections of the regulation relied on by the court of appeals appear to ignore this standard. At best, they artificially bifurcate consideration of a handicap's limits—first requiring that a student be admitted, thereby establishing expectations of success that may well be unfounded, and then permitting frustration of those expectations if "essential" academic requirements cannot be made. At worst, they disregard so thoroughly the potential limiting effects of any handicaps as to effectively equate

the operation of any performance ethic with discrimination. Nothing in the words or intent of Section 504 requires these results.

D. The regulation should adopt a standard of "reasonable accommodation" within the educational experience as a whole.

Amicus therefore believes that this Court should decline to enforce the H.E.W. 504 regulation, and should modify the judgments below, insofar as they purport to address a potential student's qualification for admission separately from his or her potential performance throughout the educational experience as a whole, and insofar as either would prohibit the taking into account of the extent and nature of possible accommodations to particular students' handicaps, on a case-by-case basis, in making admissions and other academic decisions. Such a judgment from this Court would assure handicapped students realistic and fair consideration of their applications and achievements, as intended by Section 504, in ways that the current H.E.W. regulation will not.

This position is neither novel nor unprecedented. Rather, models for precisely such an approach are contained in H.E.W.'s own regulation concerning employment subject to Section 504.

First, 45 C.F.R. 84.3(k)(1) defines a "qualified handicapped person . . . with respect to employment" as one "who, *with reasonable accommodation, can perform* the essential functions of the job in question." [Emphasis added.] Thus address of possible employment discrimination based on handicap explicitly encompasses the ability to accomplish varied and changing job functions, and the extent of assistance needed to secure that performance, rather than presumptively equating initial job-entry standards with successful employment. Substituting "can complete successfully the essential elements of the education program

in question," in the quoted section, for the phrase concern "functions of the job" would permit application of this "reasonable accommodation" standard to admissions decision in a way that would take appropriate account of an applicant's potential performance after admission.

Further, the concept of "reasonable accommodation" referenced in the employment definitions would permit consideration not only of a student's potential performance all through the educational experience, but also of the extent of accommodation that would be reasonable to facilitate such performance. Models for such analyses, realistically assessing both benefits and costs, are embodied in all federal civil rights legislation attacking job discrimination based on race, color, religion, sex, national origin, and age. Indeed, this Court defined the concept of "business necessity" as the "touchstone" of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in *Griggs, supra,* 401 U.S. at 431. Examples of such "bona fide occupational qualifications" and standards of "reasonable accommodation," "undue hardship," and "business necessity" are set out in the margin.[8]

[8] Title VII of the Civil Rights Act, 42 U.S.C. 2000e, which prohibits employment discrimination based on race, color, religion, sex, or national origin, recognizes that legitimate expectations of employee performance may justify limited employment restrictions on these bases where:

(A) "an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business," 42 U.S.C. 2000e(j). See *Hardison* v. *Trans World Airlines,* 432 U.S. 63 (1977) and *McDaniel* v. *Essex International, Inc.,* 571 F. 2d 338 (6th Cir. 1978).

(B) "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise," 42 U.S.C. 2000e-2(e), see *Dothard* v. *Rawlinson,* 433 U.S. *321* (1977) (maximum security prison may employ only male correctional officers in contact with male inmates); *Condit* v. *United Airlines, 558 F. 2d 1176 (4th Cir. 1977), affirming F. Supp. , 12 EPD Par. 11195 (E.D. Va. 1976)., cert. denied* U.S. , 98 S. Ct. 1510 (1978), *Harris* v. *Pan American World Airways,* F. Supp. , 15 EPD Par. 8015 (N.D. Cal. 1977), *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142 (7th Cir. 1978), *Burwell* v. *Eastern Airlines,* 458 F. Supp. 474 (E.D. Va. 1978) (Conditions under which elapsed time of pregnancy of flight attendants justifies suspension of duties without regard to actual individual health, stamina, or capacities).

These models have been fully adapted to federal and state provisions attacking employment discrimination based on handicap, including statutory "affirmative action" provisions applic-

(C) "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business . . . sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.,* 444 F. 2d 791 at 798 (footnotes omitted) (4th Cir. 1971), *cert. dism.* 404 U.S. 1006 (1971). See *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) and, e.g., *Spurlock* v. *United Airlines,* 475 F. 2d 216 (10th Cir. 1972) (Prior flying experience for airline pilot trainees sufficiently related to avoiding grave consequences of pilot failure, notwithstanding differential adverse impact on black applicants as a group).

Analogously, the Age Discrimination in Employment Act of 1976, 29 USC 621 *et seq.,* provides an exception to its prohibition upon employment actions taken "because of" an individual's age "where age is" a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. 623(f)(1); Compare *Houghton* v. *McDonnell Douglas,* 553 F. 2d 561 (8th Cir. 1977), *cert. denied* U.S. , 98 S. Ct. 506 (1977) (Finding that age correlated with likelihood of any test pilot's possible incapacity was sufficient to overcome favorable evidence as to particular test pilot is clearly erroneous) with *Arritt* v. *Grissell,* 567 F. 2d 1267 (4th Cir. 1977) (No proof of inability to address possible performance inadequacies individually negates use of maximum permissible age at entry to service, particularly absent clear definition of actual adverse consequences feared).

able to federal contracts,[9] and the importance of performance standards, and the efficacy of measures of "reasonable accommodation" in implementing them, already are reflected in federal and state cases construing those provisions. Such cases clearly establish that handicapping conditions cannot *per se* disqualify applicants from jobs, but that conditions must be shown to be substantially likely to unacceptably impair particular applicants in performing particular duties.[10] The cases also make clear that a wide variety of factors can and should be considered in evaluating and resolving such potential problems,[11] that applicants properly

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[9] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793, provides that federal contractors "shall take affirmative action to employ and advance in employment qualified handicapped individuals"; the Department of Labor regulations implementing Section 503 contain a "reasonable accommodation"/"undue hardship" provision similar to that of the HEW 504 regulation. 41 CFR 60-741.6(d).

[10] For cases decided under Section 504, see, e.g.: *Gurmankin* v. *Costanzo*, 556 F. 2d 184 (3rd Cir. 1977), affirming 411 F. Supp. 982 (E.D. Pa. 1976) (Blindness cannot *per se* disqualify prospective school teacher from city teacher's examination.); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F. Supp. 954, (M.D. Fla. 1978) (Past epilepsy cannot *per se* disqualify prospective police officer absent demonstration of present danger of unsuitability for job); *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (Municipality cannot absolutely exclude from employment former users of controlled drugs.)

[11] This Court granted *certiorari* last term in a case raising analogous issues under the Equal Protection cases. *Beazer* v. *New York City Transit Authority*, 558 F. 2d. 97 (2d. Cir. 1977), affirming 399 F. Supp. 1032 (S.D.N.Y. 1975), *cert. granted* U.S. , 98 S. Ct. 3121 (1978) (Past or present methadone usage cannot *per se* disqualify prospective transit employees for all jobs, but Transit Authority can make regulations "to ensure that past or present methadone users are proven to be employable and to prevent their employment in safety-sensitive jobs." 558 F. 2d at 99). Similarly, compare *Montgomery Ward* v. *Bureau of Labor*, 570 Pac. 2d 76 (Sup. Ct. Ore. 1977), with *Panettieri* v. *C.V. Hill Refrigeration*, A. 2d , 17 EPD Par. 8522 (Appel. Div. N.J. 1978) (Proof of likely adverse effect of past heart attack on performance in particular position requiring physical effort), and *Boynton Cab Co.* v. *Dept. of Industry, Labor, and Human Relations*, N.W. 2d , 18 EPD Par. 8819 (Wisc. Ct. of

need not be accommodated when the relevant proof is shown, and that such proof should address actual on-the-job capabilities, not simply the ability to meet initial standards of employment.[12] Finally, the section of the H.E.W. 504 regulation concerning "reasonable accommodation" in the context of employment illustrates the types of factors that would apply, by analogy, to

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Appeals 1978) with *N.Y. State Div. of Human Rights* v. *Averill Park Central Schl. Dist.*, 59 AD 2d 449 (Appel. Div. N.Y. 1977) (Past driving record refutes belief that person with one arm will not be safe taxi driver, applicant with corrected hearing impairment may be excluded from that position without inquiry into actual sufficiency of hearing.) See also *Fraser Shipyards* v. *Dept. of Industry, Labor, and Human Relations*, 13 EPD Par. 11515 (Cir. Ct. Wisc. 1976) (Notwithstanding demonstration that individual diabetics may be unqualified to fill positions as shipyard welders due to likelihood of disability-related conditions, sufficient such demonstration not made to disqualify particular applicant.)

[12] See, e.g., *Westinghouse Electric Corp.* v. *State Division of Human Rights*, 63 AD 2d 170, 18 EPD Par. 8868 (Appel. Div. N.Y. 1978): "The [State Human Rights Appeal] board's determination is apparently based upon the fact that the complainant at the time of his physical examination was not prevented by the condition found (dermatitis) from exercising his normal body functions and there is little question but that complainant, initially at least, could have physically performed activities involved. However, the record establishes by clear, convincing and uncontradicted medical evidence that the complainant was suffering from dermatitis which would be exacerbated by direct or indirect exposure to the chemicals known to be present in the Westinghouse plant . . . [and which therefore would] ultimately render the complainant incapable of satisfactorily performing the physical requirements of the job . . . . Thus, it seems obvious that the disability was related to complainant's "ability to engage in the activities involved in the job." *To hold, as the board apparently does, that the mere fact that the complainant could physically perform the job duties at the time of his physical examination means that the disability is unrelated to his ability to engage in the activities involved is contrary to the clear intent of the statute and the law of reason.*" 18 EPD Par. 8868 at p. 5596. [Emphasis added.]

evaluations of the effect of handicap upon admissibility to education programs and achievement within them.[13]

The regulation's failure to apply the perspective of "reasonable accommodation" stems directly from its failure to understand the role of continued achievement throughout the higher education experience, and from its refusal to acknowledge the possible adverse effects of handicap upon such achievements. By effectively ignoring handicaps, rather than requiring their meaningful analysis and accommodation, the H.E.W. regulation severely disserves handicapped students: It falsely suggests that they are exempt from the standards of performance that in many ways make higher education the valuable opportunity Section 504 seeks to perserve unto them.

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[13] 45 C.F.R. 84.12:

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include: (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget; (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and (3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant. 45 CFR 84.12.

The true intention of Section 504 is to eliminate *remediable* barriers to achievement in higher education, while acknowledging that there may be narrow but highly relevant inherent limits on the capabilities of handicapped students—as there are limits on those of all students generally. A clear understanding of this goal, and of the educational process to which it applies, should have led H.E.W. to adopt a "reasonable accommodation" standard for ameliorating the effects of handicap, analogous to standards recognizing the need for satisfactory individual performance in equal employment laws generally and in those relating to handicap specifically.

VII. CONCLUSION

Because Section 504 was enacted to prohibit exclusion from education programs on the basis of handicap alone, its purpose was to make valid measures of actual performance in such programs the touchstone of accommodating handicapped students. The sections of the regulation at issue here effectively forbid consideration of individual achievement and performance, and of possible limits thereon, in assessing proper accommodations to handicapped students. The promise of greater opportunity they hold out is thus an illusory one.

Instead, there is clear need for careful case-by-case review of the effect of a particular person's handicap on potential educational achievement, of the costs of ameliorating that handicap, and of the proper affirmative institutional response to each individual student on that basis. That focus on individual performance is precisely what equal opportunity law now requires of employers and educators in all analogous contexts, and it is consistent with the educational autonomy this Court has sought to protect when scrutinizing institutions of higher education.

Moreover, only individual attention to handicapped students and employees can properly provide them real opportunity. Handicapping conditions are not identical, and thus they are not susceptible of standardized or uniform amelioration by operation of broadly drawn rules; they have various and differentiated effects that require careful, individualized responses. The approach

recommended by *Amicus* in the application of Section 504 would emphasize the duty of educational institutions to make genuine, realistic provision for individual needs insofar as reasonably practicable.

Far from correctly applying Section 504, then, the H.E.W. regulation relied on by the court of appeals presents "persuasive indication" of "sharp . . . conflict that other indicia of the proper interpretation" of that statute. *General Electric Co.* v. *Gilbert,* 429 U.S. 125 at 143 (1976). Neither institutions of higher education nor their students should be subject to regulatory standards that misapprehend Congressional intent and that adopt positions inconsistent with the proper accomplishment of Section 504's objectives, particularly where the appropriate standard of judicial review of practices based on handicap is not yet certain.[14] Accordingly, *Amicus* urges this Court to enjoin enforcement of H.E.W.'s regulation insofar as it is written or interpreted inconsistently with principles discussed above, and to remand this mater for institutional action on plaintiff's application in light of her qualifications, her handicap, and the possibility of reasonably accommodating her handicap to successful performance in the education program to which she sought admission.

Respectfully submitted,

JEFFREY H. ORLEANS
Special Assistant to the President
The University of North Carolina
Post Office Box 2688
Chapel Hill, North Carolina 27514

ELIZABETH C. BUNTING
Counsel

Counsel for the
BOARD OF GOVERNORS OF THE
UNIVERSITY OF NORTH CAROLINA

[14] See Text accompanying notes 3 and 4, *supra.*

CERTIFICATE OF SERVICE

I hereby certify that I have caused a copy of the foregoing BRIEF AMICUS CURIAE OF THE BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA to be deposited in the United States mail, postage prepaid, and adddressed as follows:

Phillip A. Diehl
William L. Pate
Attorneys at Law
Post Office Drawer 688
Raeford, North Carolina 28376

Marc P. Charmatz
Sy DuBow
National Center for Law and the
Deaf Legal Defense Fund
7th and Florida Avenues, N.E.
Washington, D.C. 20002

Stephen H. Sachs
Attorney General
State of Maryland
1 South Calvert Street
Baltimore, Maryland 21202

This the 23rd day of March, 1979.

by: _____

ELIZABETH C. BUNTING